109-426

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 127.

W. J. SMITH AND FIELDING HURST, PLAINTIFFS IN ERROR,

vs.

MALCOLM McNEAL, W. WOODWARD, H. S. HALLIDAY, J. P. CARUTHERS, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED OCTOBER 16, 1880.

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1 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1877, at the United States court-house, in the city of Memphis, in said district, on, to wit, the day of , A. D. 18 , in the following cause, to wit:

W. J. SMITH AND FIELDING HURST, PLAINTIFF',
vs.
MALCOM MCNEAL, W. WOODWARD, H. L. HALLIDAY, J. P. CARUTHERS, VIRGINIA L. PEYTON, VIRGINIA A. PEYTON, H. E. HALLIDAY, T. R. SMITH, EVA MCNEAL, H. C. MCNEAL, MALCOM NCNEAL, FARRINGTON & HOWELL, DEFENDANT'. } No. 2416.

2 The United States circuit court for the western district of Tennessee.

W. J. SMITH AND FIELDING HURST
vs.
MALCOM MCNEAL, W. WOODWARD, H. L. HALLIDAY, J. P. CARUTHERS, VIRGINIA L. PEYTON, VIRGINIA A. PEYTON, H. E. HALLIDAY, T. R. SMITH, EVA MCNEAL, H. C. MCNEAL, MALCOM MCNEAL, AND FARRINGTON & HOWELL.

The plaintiff sues the defendant to recover the following tract of land, lying in Shelby County, district No. 5, and bounded as follows: Winchester's division, John Rice Grant; forty (40) acres assessed to Malcom McNeal in 1860 (country), containing , of which the plaintiff was possessed, claiming in fee, through a certificate of the United States district tax-commissioners, Jno. B. Rodgers, E. P. Ferry, and Delano T. Smith, under an act of Congress, entitled "An act for the collection of di-
3 rect taxes in insurrectionary districts within the United States, and for other purposes," and the acts amending the same on the 1st of January, 1865, and after such possession accrued the defendant, on the 1 day of Dec., 1865, entered thereupon and unlawfully with'olds and detains the same together with $5,000 due for detention thereof. Defendants do not claim under, but adversely to, and deny the validity of plaintiffs' claims of title, under the aforesaid acts of Congress, and the validity of the plaintiffs' claim of title under the aforesaid acts of Congress is the only question in controversy between plaintiff" and defendant'.

MYERS & SNEED,
S. R. WALKER,
Attorneys for Plaintiff'.

(Endorsed:) No. 2416. Circuit court of the United States, western district of Tennessee. W. J. Smith, et al. v. Malcom McNeal et al. Filed Oct. 20, 1877. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

3½ Circuit court of the United States, western district of Tennessee. November term, 1878.

W. J. SMITH ET ALS.
vs.
MALCOM MCNEAL ET ALS.

In this cause come the defendants, by attorney, and for plea to the declaration filed herein by plaintiffs, say actio non, because they say that plaintiffs' cause of action, if any they ever had, against defendants, accrued more than seven years before the bringing of this suit, wherefore, &c.

HENRY CRAFT,
Atto. for Def'd'ts.

And for further plea in this behalf defendants say, by their attorney, that they are not guilty in manner and form as plaintiffs in their said declaration have alleged against them. And of this, &c.

HENRY CRAFT,
Atto. for Def'd'ts.

(Endorsed:) No. 2416. Circuit court of United States, at Memphis. W. J. Smith et als. vs. Malcom McNeal et als. D'f'd'ts' pleas. Filed Jan'y 2, 1879. Bell W. Etheridge, clerk; W. B. Weisiger, d. c.

4 The President of the United States of America to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to summon Malcom McNeal, W. Woodward, H. L. Halliday, J. P. Caruthers, and Virginia L. Peyton, Virginia A. Peyton, H. E. Halliday, T. R. Smith, Eva McNeal, H. C. McNeal, Malcom McNeal, and Farrington & Howell, citizens of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the fourth Monday in November next, and then and there to answer W. J. Smith and Fielding Hurst, citizens of the State of Tennessee, in a plea of ejectment to the damage of the said plaintiffs (as they say) five thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Su-
5 preme Court of the United States, and the seal of said circuit court, at Memphis, this 22d day of October, A. D. 1877, and the
102 of American Independence.

[L. S.] H. E. ANDREWS, *Clerk.*

(Endorsed:) No. 2416. W. J. Smith et als. vs. Malcom McNeal et als. Summons. Returnable to Nov. term, A. D. 1877.

On the 26th day of October, 1877, I served certified copy of this summons, together with declaration in this case, personally on A. J. Montgomery, as tenant and occupant of the premises described in the declaration. The within Malcom McNeal, W. Woodward, H. L. Halliday, J. P. Caruthers, Virga L. Peyton, Virga A. Peyton, H. E. Halliday, T. R.

Smith, Eva McNeal, H. E. McNeal, and Farrington & Howell, after diligent search and enquiry not to be found in my district.

M. J. WALDRAN,
U. S. Marshal,
By A. J. GARDNER, *Deputy.*

Serv. sum., 2.00; service Dec., 2.00; 10 miles, 0.60—4.60.
Ret'd 6th day of Nov., A. D. 1877.

H. E. ANDREWS, *Clerk.*

6 Know all men by these presents that we, W. J. Smith and L. B. Eaton, held and firmly bound unto said defendant' in the sum of two hundred and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff' in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant'; and, also, on failure of the said plaintiff' to prosecute the said suit with effect; and, also, on failure of the defendant', if convicted, to pay said costs.

Witness our hands and seals this 28th day of Sept., A. D. 1877.

W. J. SMITH. [SEAL.]
L. B. EATON. [SEAL.]

Approved by and acknowledged before me the 28th day of Sept., A. D. 1877.

H. E. ANDREWS, *Clerk.*

7 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 28th day of May, A. D. 1878, in the following cause, to wit:

W. J. SMITH ET ALS., PLAINTIFF',
vs.
MALCOM MCNEIL ET ALS., DEFENDANT'. } No. 2416.

Before Hon. John Baxter, circuit judge.

For satisfactory reasons to the court appearing the above-entitled cause is continued to the next term of this court.

8 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held

for its Nov. term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 13th day of Dec., A. D. 1878, in the following cause, to wit:

SMITH & HURST, PLAINTIFF',
vs.
MALCOM MCNEAL ET ALS., DEFENDANT'. } No. 2416.

This cause was called for trial, and there being no response by the parties or their counsel, it is ordered that the same be continued to the next term of this court.

9 Circuit court United States, western district Tennessee.

W. J. SMITH ET. ALS.
vs.
MALCOM MCNEAL ET ALS. } 2416.

Now come the plaintiffs, by attorneys, and as to defendants' plea herein pleaded say, that on the 31st of December, 1873, and within seven years from the time the plaintiffs' cause of action accrued, the plaintiffs' brought suit against defendants in this court to recover possession of the same premises whereof plaintiffs' here now seek to recover possession; and the said suit was commenced upon the same cause of action that the plaintiffs now writ and action are founded. That the said action so commenced as aforesaid, was duly prosecuted by plaintiffs, until the 1st of September, 1877, upon which day a judgment (which said judgment remaining of record in this court is referred to,) was therein rendered by said
10 circuit court upon a ground not concluding their said right of action. The record of said former suit remains in this court, and plaintiffs here make profert of the same; all of which plaintiffs are willing to certify.

METCALF & WALKER,
MYERS & SNEED, *Att'ys.*

(Endorsed:) 2416. United States circuit court, western district of Tennessee. W. J. Smith et als. vs. Malcom McNeal et als. Similiter and replication. Filed Jan'y 4, 1879. Bell W. Etheridge, clerk.; H. E. Andrews, d. c.

11 In the circuit court of United States for western district of Tennessee.

W. J. SMITH AND OTHERS,
vs.
MALCOM MCNEAL AND OTHERS. } 2416.

And now come the said defendants, by their attorneys, and demur to the replication filed herein by plaintiff to defendants' plea, and for cause of demurrer assign, that it appears by reference to the judgment referred to and made a part of his replication by plaintiff, that said judgment was one upon the merits of the cause, and that consequently plaintiffs are

bound by the statute of limitation; wherefore for want of sufficient replication in this behalf the said defendants pray judgment if the said plaintiff's ought to have or maintain this aforesaid action against them.

CRAFT AND COOPER,
Attorneys for Defendants.

12 And for further ground and causes of demurrer to said replication defendants say, that it appears from the record of the former suit of which plaintiffs made profert, and upon which they rely to save their right of action under the statutes of Tennessee, was brought in a court which had no jurisdiction thereof, as was determined by the judgment of this court therein, which judgment stands in full force, and was dismissed for want of jurisdiction; whereupon defendants say that it appears from exemplification of the record of said former suit, which is to the court shown by said replications, and made part thereof, that the same was not a suit, and does not avail to save to plaintiffs their right of action herein; whereupon defendants pray judgment of said replication, &c.

CRAFT & COOPER,
For Defendants.

13 (Endorsed:) 2416. Law. W. J. Smith and others vs. Malcom McNeal and others. Demurrer. Filed March 28th, 1877. Bell W. Etheridge, clerk; H. E. Andrews, d. c.

14 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its Nov. term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 7 day of Jan'y, A. D. 1879, in the following cause, to wit:

W. J. SMITH ET AL., PLAINTIFF',
vs.
MALCOM MCNEAL ET AL., DEFENDANT'. } No. 2416.

It is ordered in this case that the defendant's plea to plaintiffs' declaration be filed by the clerk as of date December 2d, 1878; counsel of both sides agreeing in open court thereto.

15 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1879, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 27, day of May, A. D. 1879, in the following cause, to wit:

W. J. SMITH ET AL., PLAINTIFF', *vs.* MALCOM MCNEAL ET AL., DEFENDANT'. } No. 2416.

This cause came on this day to be heard upon the demurrer of defendants to the replication of plaintiffs to the plea of defendants setting up the statute of limitations, and the court, having carefully considered said demurrer, is of opinion that the same should be sustained; it is therefore considered by the court that the said demurrer be, and the same is hereby, sustained, and plaintiffs' suit is dismissed at the cost of plaintiffs.

Judge Hammond, being incompetent, did not sit in this case.

16 Circuit court of the United States, western district of Tennessee.

W. J. SMITH ET AL. *vs.* MALCOM MCNEAL. } 2416.

Affiant, being first duly sworn, deposes and says that he knows the land in litigation in this cause, and has recently made an examination of the same and considers himself a competent judge of the valuation of such property, and would say that it is worth one hundred and fifty dollars per acre.

N. D. SMITH.

Sworn and subscribed to before me this 2d day of February, A. D. 1880.

[L. S.] S. S. GARRETT,
U. S. Commissioner, Western Dis. Tenn.

(Indorsed:) No. 2416. W. J. Smith et al. v. Malcom McNeal et als. Affidavit. Filed Feb'y 2, 1880. Bell W. Etheridge, clerk; W. B. Weisiger, d. c.

17 Circuit court of the United States, western district of Tennessee.

W. J. SMITH ET AL. *v.* MALCOM MCNEAL ET ALS. } 2416.

Affiant, being duly sworn, deposes and says that he knows very well the real estate in litigation in this cause; he lives just adjoining this property, and has lived there for many years; that he considers himself a judge of such property, and would say that the same is worth at least one hundred and fifty dollars per acre.

R. G. CRAIG.

Subscribed and sworn to before me this the 2d day of February, 1880.

[L. S.] N. D. SMITH,
Notary Public.

(Endorsed:) No. 2416. W. J. Smith et al. v. Malcom McNeal et als. Affidavit. Filed Feb. 2d, 1880. Bell W. Etheridge, clerk; W. B. Weisiger, d. c.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said circuit court before you, between W. J. Smith and Fielding Hurst, plaintiffs, and Malcom McNeal, W. Woodward, H. S. Halliday, J. P. Caruthers, Virginia L. Poyton, Virginia A. Peyton, H. E. Halliday, T. R. Smith, Eva McNeal, H. C. McNeal, Malcom McNeal, & Farrington & Howell, defendants, a manifest error hath happened to the great damage of the said W. J. Smith and Fielding Hurst as by complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1880, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 25th day of Feb'y, A. D. 1880, and 104th of American Independence.

BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

(Indorsed:) No. 2416. Circuit court of the United States, western district of Tennessee. W. J. Smith and Fielding Hurst vs. Malcom McNeal et als. Writ of error. Issued the 25th day of Feb., A. D. 1880. Bell W. Etheridge, clerk.

19 Supreme Court of the United States.

Know all men by these presents that we, W. J. Smith and L. B. Eaton, are held and firmly bound unto Malcom McNeal et als. in the sum of two hundred and fifty dollars, to be paid to the said Malcom McNeal et als., executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this 24th day of February, 1880.

Whereas the above-named W. J. Smith et als. have prosecuted a writ of appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named W. J. Smith shall prosecute his said writ of appeal to effect, and answer all costs and damages if he shall fail to make good his plea,

then this obligation shall be void; otherwise to remain in full force and virtue.

W. J. SMITH. [SEAL.]
L. B. EATON. [SEAL.]

Acknowledged before me this 24th day of February, 1880.
BELL W. ETHERIDGE, *Clerk.*

Bond approved M'ch 13, 1880.
E. S. HAMMOND, *J.*

20 (Endorsed:) No. 2416. Circuit court of the United States, western district of Tennessee. W. J. Smith et als. vs. Malcom McNeal et als. Writ of error, bond to United States Supreme Court. Filed the 25th day of Feb'y, A. D. 1880. Bell W. Etheridge, clerk.

21 United States of America to Malcom McNeal, W. Woodward, H. S. Halliday, J. P. Caruthers, Virginia L. Peyton, Virginia A. Peyton, H. E. Halliday, T. R. Smith, Eva McNeal, H. C. McNeal, Malcom McNeal, and Farrington & Howell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1880, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein W. J. Smith and Fielding Hurst are plaintiffs and you are defendant' in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 13th day of March, 1880.

E. S. HAMMOND, *Judge.*

22 (Endorsed:) No. 9416. Circuit court of the United States, western district of Tennessee. W. J. Smith et als. vs. Malcom McNeal et als. Citation. Filed the 13th day of March, A. D. 1880. Bell W. Etheridge, clerk.

WESTERN DISTRICT OF TENNESSEE, *ss:*

At Memphis, Tennessee, within the said district, on the 19th day March, A. D. 1880, being unable to locate or find within my district either of the within-named defendants, and by direction of Mess. Myers & Sneed, attorneys for the plaintiffs herein, I served a certified copy of this citation personally upon Henry Craft, as attorney of record for the within named defendants.

M. T. WILLIAMSON,
U. S. Marshal W. Dist. Tenn.

Serv., 2.00; 1 mile, 0.06—$2.06.

Ret'd and filed March 22d, 1880. Bell W. Etheridge, clerk; W. B. Weisiger, d. c.

22½ THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee:

I, Bell W. Etheridge, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect and correct copy of the original record and proceedings in said court as the same now appear of record and upon the files in my office, in the following cause, to wit, W. J. Smith et als. vs. Malcom McNeal et als. # 2416.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 12th day of July, A. D. 1880, and of the Independence of the United States the 105th year.

[SEAL.] BELL. W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

(Indorsed:) No. 2416. Circuit court of the United States, district of West Tennessee. W. J. Smith et als. vs. Malcom McNeal et als.

23 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceeding had in said court at a regular term thereof, begun and held for its May term, A. D. 1874, at the United States court-house, in the city of Memphis, in said district, on, to wit, the day of , A. D. 18 , in the following cause, to wit:

W. J. SMITH ET ALS., PLAINTIFF',
vs.
MALCOM MCNEAL ET ALS., DEFENDANT'. } No. 1634.

24 The United States circuit court for western district of Tennessee.

F. B. SLACK, W. J. SMITH, MARY A. R. SMITH, and Fielding Hurst,
vs.
MALCOM MCNEAL, W. WOODWARD, H. L. HOLLIDAY, J. P. Caruthers, Virginia L. Peyton.

The plaintiff sues the defendant to recover the following tract of land, lying in Shelby County, district No. 5, and bounded as follows: Winchester division, John Rice grant forty (40) acres; assessed to Malcom McNeal in 1860 (country), containing , of which the plaintiff was possessed, claiming in fee, through a certificate of the United States district tax-commissioners, Jno. B. Rogers, E. P. Fery, Delano T. Smith, under an act of Congress entitled "An act for the collection of *district* taxes in insurrectionary districts within the United States, and for other
25 purposes," and the acts amending the same on the 1st of January, 1865, and after such possession accrued, the defendant, on the 1st

day of December, 1865, entered thereupon and unlawfully with'olds and detains the same together with $5,000 due for detention thereof.

McRAE, MYERS AND SNEED,
Attorneys for Plaintiff.

(Endorsed:) No. 1634. W. J. Smith et als. v. Malcom McNeal et als. Declaration. Filed December 31st, 1873. H. E. Andrews, clerk.

26 UNITED STATES OF AMERICA:

Tax-sale certificate No. 795.

This is to certify that a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and the act amending the same, held pursuant to notice, at Memphis, in the county of Shelby, in the State of Tennessee, on the twenty-second day of June, A. D. 1864, the tract or parcel of land hereinafter described, situate in the county of Shelby and State aforesaid, and described as follows, to wit: Winchester division, John Rice grant, forty (40) acres; assessed to Malcolm McNeal in 1860, fifth civil district (country), was sold and struck off to William J. Smith and Fielding Hurst for the sum of twelve hundred dollars and cents, they being the highest bidder, and that being the highest sum bidden for the same, the receipt of which said
27 sum in full is hereby acknowledged and confessed.

Given under our hands, at Memphis, this twenty-second day of June, A. D. 1864.

JNO. B. RODGERS,
E. P. FERRY,
DELANO T. SMITH,
Commissioners.

STATE OF TENNESSEE,
Shelby County:

The foregoing and hereto-attached certificate, with the clerk's certificate and United States revenue stamps to the amount of $, duly cancelled, thereto attached, was filed in my office for registration on the 2d day of September, 1867, at 10 o'clock a. m., and so noted in note-book No. 6, page 61; and the same was this day duly recorded in my office in record book No. 61, pages 536 and 537, Sept. 4th, 1867.

C. W. JOHNSTON, *Register.*

(Endorsed:) No. 1634. United States tax-sale certificate No. 795. Names of purchasers, William J. Smith and Fielding Hurst. Date of sale, June 22d, 1864; amount of sale, $1,200.00. Filed Dec. 31st, 1873. H. E. Andrews, clerk.

28 I, Horace E. Andrews, clerk of the U. S. circuit court for the western district of Tennessee, do hereby certify that the foregoing is a true and complete copy of the original certificate as the same appears of record and on the files in said court.

Witness my signature and seal of said court this 29th day of January, 1877.

[L. S.] H. E. ANDREWS, *Clk.*

(Endorsed:) No. 1634. United States tax-sale certificate No. 795. Names of purchasers, Wm. J. Smith and Fielding Hurst. Date of sale, June 22d, 1864; amount of sale, $1,200.00. Filed Dec. 31st, 1873. H. E. Andrews, clerk.

Filed in place of original, by order of court, January 29th, 1877.

H. E. ANDREWS, *Clerk.*

29 The President of the United States to the marshal of the district of West Tennessee, greeting:

You are hereby commanded to summon Malcom McNeal, W. Woodward, H. L. Holliday, J. P. Caruthers, and Virginia L. Peyton, citizens of the State Tennessee, if be found within your district, to appear before the judge of the circuit court of the United States in the sixth circuit for the district of West Tennessee, at Memphis, on the 4th Monday in May, 1874, next, and then and there to answer W. J. Smith and wife, Mary A. R., F. B. Slack, and Fielding Hurst of a plea whereof they broke and entered the close of said plaintiffs to their damage $5,000. Copy declaration herewith.

Herein fail not, and have you then and there this writ.

Witness the Hon. Nathan Clifford, Acting Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, the 31 day of December, 1873.

HORACE E. ANDREWS,
Clerk.

30 (Endorsed:) No. 1634. W. J. Smith et als. vs. Malcom McNeal et als. Summons. Issued 31 day of Dec., 1873. H. E. Andrews, clerk.

Executed by making known the contents and delivering a copy of the declaration to J. P. Caruthers on Feb. 5th, 1874; executed by making known the contents on Feb. 5th, 1874, to Virg. L. Peyton.

L. B. EATON, *U. S. M.*
L. E. BANNING, *Deputy.*

After diligent search the within named Malcolm McNeal, W. Woodward, and H. L. Holliday not to be found in my district. April 25, 1874.

L. B. EATON, *U. S. M.*
L. E. BANNING, *Deputy.*

McRae, Myers and Sneed,
Attorneys.

Ret'd & filed April 28th, 1874. H. E. Andrews, clerk.

31 Know all men by these presents, that W. J. Smith, R. M. Thompson, and Fielding Hurst held and firmly bound unto said defendants in the sum of two hundred and fifty dollars, to be void on con-

dition that said plaintiffs do pay and satisfy all costs that may accrue in that behalf in the prosecution of a suit this day commenced by in the circuit court of the United States for the district of West Tennessee, at Memphis, against said defendants on failure of the plaintiff to prosecute said suit with effect; and also on failure of the defendant, if convicted, to pay said costs; and we agree that judgment on motion may be rendered against us for the same.

Witness . hand and seal this 31 day of Dec., 1873.

W. S. SMITH. [SEAL.]
R. M. THOMPSON. [SEAL.]
FIELDING HURST,
By W. M. SNEED, *Att'y.*

32 In circuit court of the United States for district of West Tennessee, May term, 1874.

SMITH AND HURST
vs.
MALCOLM MCNEAL, JOHN P. CARUTHERS, AND others.

Come the defendants by their attorneys, and for plea herein they say are not guilty of the wrong and injury in manner and form as in plaintiffs' declaration is alleged, and of this they put themselves upon the country.

KORTRECHT, CRAFT & SCALES,
Att'ys for Defendants.

(Endorsed:) 1634. Smith and Hurst vs. Malcom McNeal, J. P. Caruthers et als. Pleas. Filed May 25th, 1874. H. E. Andrews, clerk.

33 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1874, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 2d day of June, A. D. 1874, in the following cause, to wit:

W. J. SMITH ET ALS., PLAINTIFF',
vs.
MALCOM MCNEAL ET ALS., DEFENDANT'. } No. 1634.

Came the parties by their attorneys and moved the court to dismiss the above cause for want of jurisdiction, and upon motion of attorney for defendants and by agreement of counsel leave is granted to withdraw the pleas filed in the above suit.

34 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held

for its May term, A. D. 1874, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 10th day of June, A. D. 1874, in the following cause, to wit:

W. J. SMITH ET ALS., PLAINTIFF',
vs.
MALCOM MCNEAL ET ALS., DEFENDANT'. } No. 1634.

It is hereby ordered by the court that the above cause, numbered 1634, be continued till the 3d Monday in September, 1874.

35 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1874, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 25th day of Sept., A. D. 1874, in the following cause, to wit:

W. J. SMITH ET ALS., PLAINTIFF',
vs.
MALCOM MCNEAL ET ALS., DEFENDANT'. } No. 1634.

For satisfactory reasons to the court appearing, it is hereby ordered by the court that the above cause be continued to the next term of this court.

36 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its Nov'r term, A. D. 1874, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 17th day of April, A. D. 1875, in the following cause, to wit:

W. J. SMITH ET ALS., PLAINTIFF',
vs.
MALCOM MCNEAL ET ALS., DEFENDANT'. } No. 1634.

Ordered, that all causes in this court not otherwise disposed of be continued to the next term.

37 In circuit court of the United States for the district of West Tennessee.

W. J. SMITH ET ALS.
v.
MALCOM MCNEAL ET ALS.

The defendant, Virginia L. Peyton, by her attorney, disclaiming all

right as to the rest of the land and premises except that hereinafter named, for further plea herein, by leave of the court, as to the following-described portion of the premises in the declaration mentioned, to wit: Beginning at a stake on the west line of the Lumpkin tract, of acres; thence north with the Lumpkin line four hundred and five (405) feet to a stake; thence west and parallel with Poplar street or the old State-line road three hundred and eighty (380) feet to a stake; thence south four hundred and five (405) feet to the north line of the Bettis ten-acre tract; thence east with
said line and the north line of the Lainer tract of about two-and-a-
38 half (2½) acre tract to the beginning, containing three and one-half acres, says she is not guilty of the wrong and injury in manner and form as the plaintiff in his declaration hath alleged, and of this she puts herself upon the country.

T. B. MICOU,
For Def't V. L. Peyton.

(Endorsed:) 1634. W. J. Smith et al. v. Malcom McNeal et al. Amended plea of V. L. Peyton. Filed Feb'y 8, 1876. H. E. Andrews, clerk. Micou, sol.

39 (District No. 5. Folio sup.)

MEMPHIS, TENN., *Feb'y* 28, 1872.

M. *Virginia L. Peyton, Dr., to State and county taxes for* 1871.

	Lot.	Block.	Valuation.	
3½ acres north of Union ave. E. & adj. Caruthers, & north of Bettis & Armstrong & Lanier tract, west of Lumpkin tract, $700.				
State, rec'd cash				$4 20
County				4 20
Mississippi River Railroad bonds				1 05
Interest on Memphis & Ohio R. R. coupons				2 10
Judgments vs. county				2 10
Poll				2 28
				$15 93

Received payment of T. H. Logwood, solicitor.

WM. McLEAN,
Tax Collector,
Per WM. SON, *Deputy.*

(Endorsed:)

Mrs. V. L. PEYTON:

You will observe that I have only paid the taxes for you on the Caruthers land for the year 1871. After a long investigation I found
40 that this 3½ acres had not been assessed for taxes for the years 1869 & 1870, nor for 1871. It is too late for the tax-collector to sell for the years 1869 & '70, but not for 1871. I therefore had the land assessed for 1871 at the rate of lands adjoining it for 1871, and this is the receipt for it. If you should offer the land for sale, and *and* the non-

payment of the taxes for 1869 and 1870 should be a difficulty, &c., show this note or refer them to me or General M. T. Williamson at the tax-collector's office, and we will explain more fully. You will have to pay the taxes in future, including this year, 1872.

T. H. LOGWOOD,
Att'y at law.

41 In the circuit court of the United States for the western district of Tennessee, May term, 1876.

W. J. SMITH
vs.
MALCOM MCNEIL ET ALS. } 1634.

Come the defendants, Malcom McNeil and J. P. Caruthers, who have been duly summoned, &c., and demur to plaintiff's declaration in this cause upon the following grounds:

1st. The property sued for is not so described in plaintiff's declaration as to identify it, or to enable defendants to know whether they claim it, or are in possession of it, or were when the suit was commenced.

2d. Plaintiff's declaration does not show that plaintiff is not a citizen of this State so as to give this court jurisdiction of the cause, and they pray the court, &c.

CHAS. KORTRECHT.
H. CRAFT & CARUTHERS.

(Endorsed:) No. 1634. W. J. Smith vs. M. McNeil et als. Demurrer to declaration. Filed July 1st, 1876. H. E. Andrews, clerk.

42 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judical circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its Nov. term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 24th day of Feb'y, A. D. 1877, in the following cause, to wit:

W. J. SMITH ET ALS., PLAINTIFF',
vs.
MALCOM MCNEAL ET ALS., DEFENDANT'. } No. 1634.

The above cause having been heard and argued on the demurrers of defendants to plaintiffs' declarations, and the court having fully considered the questions involved in the said suits, is of opinion that said demurrers are well taken as to the questions of jurisdiction. It is, therefore, considered,
ordered, and decreed, that said demurrers be, and they are hereby,
43 sustained, and plaintiffs' suits dismissed upon the ground that the court has no jurisdiction of the cause of action in plaintiffs' declarations alleged and set forth.

44 In circuit court of United States for western district of Tennessee.

W. J. SMITH AND WIFE, MARY A. R. SMITH, F. B. Slack, Fielding Hurst, *vs.* MALCOM MCNEAL ET ALS. } 1634.

Be it remembered that this cause came on to be heard before the honorable Connally F. Trigg, at the November term, A. D. 1876, the judge presiding, upon the demurrer of the defendant, Malcom McNeal, as to the jurisdiction of this court over the cause, and whereupon, after full argument by both plaintiff' and defendant' upon said jurisdiction, in which the plaintiff recited and relied upon act of Congress of 1833, 4th Statute at Large, 632, and the judiciary act 1874, as well as other acts of Congress relative to said subject, and after fully considering
45 the same, the court was of the opinion that this court had no jurisdiction to try the cause upon its merits, and thereupon sustained the defendants' demurrer so far as the question of jurisdiction was therein raised, and dismissed plaintiffs' suit for said reason, but did not pass upon the other grounds of objection raised in the demurrer; to which ruling of the court, the plaintiff' then and there excepted, which exception was overruled by the court, and thereupon the plaintiffs tender this their bill of exceptions which was signed, sealed, and made part of the record in this cause.

CONNALLY F. TRIGG, [SEAL.]
U. S. District Judge.

(Endorsed:) 1634. Law. W. J. Smith et als. vs. Malcom McNeal et als. Bill of exceptions. Filed March 22d, 1877. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

46 THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee:

I, Bell W. Etheridge, clerk of the circuit court of the United States, for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings, and made an exhibit to No. 2416, in said court, as the same now appears of record and upon the files in my office, in the following cause, to wit, W. J. Smith et al. vs. Malcom McNeal et als. #1634.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 12th day of July, A. D. 1880, and of the Independence of the United States the 104th year.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
W. B. WEISIGER, *D. C.*

(Indorsed:) No. 1634. Circuit court of the United States, district of West Tennessee. W. J. Smith et als. vs. Malcom McNeal et als.

(Indorsement on cover:) No. 127. W. J. Smith & Fielding Hurst, plaintiffs in error, vs. Malcom McNeal, W. Woodward, H. S. Halliday, J. P. Caruthers, et al. W. Tennessee C. C. U. S. Filed 16th October, 1880.

109-426

No. 127.

W. J. SMITH,

vs. } BRIEF OF PLANITIFF.

MALCOLM McNEAL, et. als.

In Supreme Court of United States.

D. E. MYERS,
W. M. SNEED,
S. P. WALKER,
ATTORNEYS.

W. J. SMITH, et. al.,

VS. } No. 127 SUPREME COURT, U. S.

MALCOLM McNEAL, et. al.

STATEMENT.

This is an action of ejectment commenced in the Circuit Court of United States for Western District of Tennessee, on the 20th day of October, 1877, by the plaintiffs to recover possession of the land described in the declaration, which said lands was purchased and is now claimed by plaintiffs, under a sale made of the same under an Act of Congress entitled "An Act for the Collection of Taxes in Insurrectionary Districts," of date June 7, 1862, and Acts amendatory thereof—said sale being of date June 22, 1864, and evidenced by the tax certificate exhibited in the pleadings.

The defendants pleaded the Statute of Limitation of seven years.

To which the plaintiff replied that the plaintiffs, on the 31st of December, 1873, and within seven years from time the plaintiffs' cause of action accrued, brought suit against defendants to recover possession of the same premises whereof plaintiffs now seek to recover possession, and the said suit was commenced upon the same cause of action that plaintiffs' now writ and action is founded. That the action so commenced as aforesaid was duly prosecuted by the plaintiffs until September 1, 1877, upon which day judgment was therein rendered by said Court upon a ground not concluding their said right of action. The record of said former suit was made profert of by plaintiffs.

To this replication the defendants filed two grounds of demurrer.

First—Because it appeared by reference to the judgment referred to that said first judgment was upon the merits.

Second—Because from the records of said former suit the Court had no jurisdiction thereof, and said cause was dismissed for want of of jurisdiction.

The cause came on to be heard upon the demurrer of defendants to the replication of plaintiffs, to the plea of defendants setting up the Statute of Limitation, whereupon the Court sustained the demurrer, and plaintiffs sued out a writ of error to this Court.

ASSIGNMENT OF ERRORS.

I.

The plaintiffs say that the Court erred in holding that the former suit and judgment rendered therein was not an action or commencement of a suit within the terms of Section 2755, Code of Tennessee, and upon the dismissal of which, plaintiffs were entitled to commence a new suit within one year thereafter.

II.

Because the Court erred in holding that the first suit was commenced in a Court not having jurisdiction.

BRIEF.

I.

The plaintiffs claim the right to maintain the second suit, which was commenced on October 20, 1877, after a dismissal, of the former on September 1, 1877, under Section 2755, Code of Tennessee, regardless of the question of jurisdiction of the Court as to the first suit.

II.

That the jurisdiction existed in the first suit, notwithstanding the judgment of the Court in that cause.

The section of the Code under which this action is brought reads as follows:

"If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered against the plaintiff and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may from time to time commence a new action within one year after the reversal or arrest."

This section originated with the Code in 1870, and prior to that date the Acts of 1815 and 1819, which was the law on that subject, provided for the commencement of a new suit within the year, only in the following cases, to-wit: First, where judgment for plaintiff had been reversed on writ of error; second, where judgment had been arrested, and third, where defendant could not be served with process.

It will be observed that not only was this former law as to grounds for commencing a new suit carried into this section of the Code, but said section was extended in its saving clause by adding, "*any ground not concluding his right of action.*"

We submit that this section of the Code is sufficiently broad to justify the maintainance of the present suit, as the judgment or dismissal in the former suit was undoubtedly upon a ground not concluding plaintiffs' right of action.

This leads to the inquiry: Is a suit in which a judgment of dismissal for want of jurisdiction is awarded, a commencement of a suit within the meaning of this section 2755?

So far as we have been able to ascertain, the Supreme Court of Tennessee has never passed upon this identical question, though we submit that there are cases in said Court upon the construction of this section, which in effect adjudicate the same for us. In the case of Cole, vs. Mayor and Aldermen, 5 Cold. 639—the plaintiff brought suit against the defendant in 1860, which remained on the docket until May, 1865, when it was dismissed for want of papers, and within the year plaintiff commenced his second action. Held—

Massachusetts Statute under consideration provided that a new suit might be commenced where the writ in the former was abated or the action defeated "for matter of form." The defendant denied that the first action was duly commenced, and the point here turned on the words "action duly commenced." Court says: "We therefore understand that by an action duly commenced, that section means an action or a claim actually declared upon in a proper writ returnable according to law." "And if these last words had been inserted in section 11 instead of the words duly commenced we could not have understood a proper writ to mean a writ that could not be abated or defeated for any matter of form, but must have understood it to mean a writ adapted to the cause of action. Such a writ was sued out and declared on by plaintiff." "Secondly, The defendant denied the writ abated or the action otherwise defeated or avoided for matter of form, because the Court dismissed that action for want of jurisdiction. The same being between two trustees in a county of which neither were citizens." Held the new action could be maintained under the statute.

This case in 1st Gray above referred to cites and approves the case of Coffin vs. Cattle, 16 Pick. 383, a cause arising under a similar statute.

Here the first suit was against defendant as administrator, and upon the trial it was adjudged that the letters of administration were void for want of jurisdiction. Court says: "This is a remedial statute both in its enacting and qualifying clauses, and should have such construction as will best carry into effect the intent of the Legislature." (citing Middleton vs. Forbes, 259 note) "This statute is founded on the presumption that if a creditor has permitted his debt to remain a certain length of time without any attempt to enforce it, or to revive and perpetuate the evidence of it, it is paid or otherwise discharged." "But this presumption does not arise if the creditor resorts to legal diligence to recover his debt, and the proviso in the statute follows the obvious consideration and declares that where the plaintiff

has been defeated by some matter not affecting the merits, some defect or informality which he can remedy or avoid by a new process, the statute shall not prevent him from so doing."

The meaning of this statute as defined by said Court was to allow a new suit, where the first action had been defeated by some matter not affecting the merits; and if the language in that statute is sufficiently broad for that construction, then we say the Tennessee Statute is equally so when it uses the words "any grounds not concluding his right of action."

In the case of Givens vs. Robins, 11 Ala. 156, under a statute providing for new suit where there is reversal judgment by writ of error, or verdict for plaintiff, and on matter in arrest, judgment afterwards given against him, Court says: "The manifest intent of the Legislature was to prevent the bar from operating where the plaintiff having sued in time has been prevented from collecting his debt by error of Court or by mistake, which did not impute neglect or laches to him, and it is therefore entirely reasonable to suppose that the instances put in the statute are by way of example, and that it was not intended to confine the remedy to the precise state of facts there enumerated. "The repose of society certainly requires that stale demands should not be enforced, because after great length of time it may be difficult if not impossible to prove a judgment or other discharge where it really exists. But this consideration is entitled to no weight where the creditor has not slept on his rights, but has for years actively been trying to enforce them."

Under section 21, Bankrupt Act, section 5105, United States Statutes, no creditor who had proved his debt could commence any suit against the bankrupt until question of his discharge had been determined. Held under this statute in case of Rosenthal vs. Plumb, 32 N.Y. 336, "it was not necessary to show that Bankrupt Court had jurisdiction of the proceedings." Court says: "It is sufficient to show that the

Court entertained the proceeding and the bankrupt himself made application for his discharge."

Under statute of North Carolina in case of Martin vs. Young, 85 N. C. 156, "where an individual partner brings suits in his own name and defeated by reason of nonjoinder of partners held he could bring new suit within the year." The statute here was one providing for second suit in case only of reversal or arrest of judgment, Code N. C., section 65-8. As shown in Angel on Limitations, section 324, page 340, plaintiff sued defendant as administrator. While suit was pending letters of administration were revoked by reason of nullity of the first letters; held "second action could be maintained under a statute providing for a second suit after reversal or arrest of judgment."

The Iowa Statute reads as follows: "After the commencement of an action the plaintiff therein for any cause except negligence in its prosecution, may bring a new suit within six months.—Code 2537. Held under this statute in case of McDonald vs. Jackson, 55 Iowa, page 40, that this section applies to any case when no judgment upon the merits is rendered."

In case of Sorrell vs. Lourent, 27 La. Annual, page 70, 71, it is held "that a suit instituted in a Court without jurisdiction interrupts prescription."

Statute of Vermont provides where one is driven out of Court from technical objection to the writ so that merits of the case are not reached, a new suit may be commenced. Plaintiff commenced suit in his own name, Mr. Curtis as guardian, instead of Lucy A. Spear by guardian and next friend. Held case was within the saving statute.

In the case of Akers, administrator, vs. West, 1st Baxter, 23 (Tenn.,) the statute required all creditors in insolvent proceedings to file their claim within limited time or they were forever barred. At the May term, 1869, an order was entered directing that Stokes, a creditor, be made party and have until the next term to file his claim. Stokes failed

to file his claim at the term required and did not do so until November (1870) term, at which date the prescribed time had expired. Section 2376, Code of Tennessee, provided that "to save the operation of the Statute of Limitation any creditor may present his claim to the clerk in vacation as well as in term time. Held that the fact of making himself party as above stated, &c., was a presentation of his claim within the construction of this statute. This case is cited to illustrate the liberality the Tennessee courts give to these saving statute in order to save the right.

DEFENDANT'S AUTHORITIES.

The defendant cites the cases of Gray va. Hodge, 50 Ga. 263 and Williamson vs. Wordlow 46 Ga. 126.

The Statute of Georgia under which these cases were decided reads as follows: "If judgment shall be given for plaintiff and the same reversed or a verdict rendered for plaintiff and upon matter alleged in arrest of judgment it be given against plaintiff" &c.; a new suit may be commenced &c.—Princes Digest of Georgia, page 575.

Under this statute in the above cases it was held that upon a judgment rendered by a Court not having jurisdiction a new suit could not be commenced. It may be true that a suit under this statute could not be commenced on a reversal of such a judgment, for the reason that not being rendered by a Court of competent jurisdiction it was not a judgment as contemplated by said statute, and therefore not saved by said statute, yet it would not follow that the present case is not within section 2755 of the Code of Tennessee, for the statutes are totally different. The right to bring the new suit under the Georgia Statute is dependent on a judgment having been obtained in the first suit, and as the granting of a judgment is a judicial act to be performed by a judicial office having jurisdiction, a nonperformance of that act or the performance of it by a Court not having jurisdiction, left the condition upon which the new suit could be commenced, namely: the creation of a judgment, unfulfilled.

But under the Statute of Tennessee there is no judicial act to be performed as a condition precedent to the commencement of the new suit. The suit is commenced by plaintiff suing out his summons, and upon a dismissal of this summons or suit on part of plaintiff without any action on part of the Court, the new suit can be commenced under the Tennessee Code, section 2755, as shown by Tennessee authorities before cited. Under the Tennessee Statute the commencement of the suit, which is the issuing of the summons, is the condition precedent upon which the new suit is based. While under the Georgia Statute it is the rendition of a judgment which can only be rendered by Court having jurisdiction.

Again in the case cited in 50 Georgia and relied upon by defendant, it is stated that the facts therein cited did not constitute a commencement of a suit under the Georgia Statute, while under the Tennessee Statute the summons is a commencement of a suit as contemplated by section 2755. See Code 2754 and authorities before cited. The Code of Georgia seems to have no such statute as section 2754 of Code of Tennessee, for if it had these cases cited by defendant would in all probability have held that the facts in said cases were a commencement of a suit within the Georgia Code.

The case of Isaacs vs. Price, 2d Dillon, page 347, cited by defendant does not sustain him. It only decides that where a Court has no jurisdiction a judgment rendered by it is void, which we do not deny. This case sustains us to the effect that an action shall be deemed commenced at the date of the summons. This case further decides that the purpose of the Statute of Limitations is to protect persons from stale demands, and the reason on which the Legislature rests is the neglect and laches of plaintiff to prosecute; and that the facts in that case did not bring the plaintiff within the purpose because he had a suit previously pending.

In the case of Caldwell vs. Harding, 1st Lowell, p. 326,

the statute provided that if the former action was abated or defeated in consequence of any defect, &c., or a mistake in form of proceeding, the plaintiff might commence a new action, &c.

Plaintiff had brought a former suit in Circuit Court of United States which was dimissed for want of jurisdiction. Held the action was abated or defeated in consequence of a defect in form of proceedings within the statute, so that the new action could be brought within the year.

In this cause the suit was dismissed for want of jurisdiction as to parties held that the same was a mistake of form, under the statute, and new suit was sustained. The statute says the Court, intends to guard against mistakes which are not of substance, whether large or small.

The case in 1st Lowell, above referred to, cites and approves Woods vs. Houghton, 1 Gray, page 580, where the statute provides for a new suit where the writ shall be "abated or the action be defeated for matter of form." The defendant denied that the first action was in consequence of a mistake of form as contemplated by the statute. Court says: "We find the Massachusetts Courts have given this exception a very liberal interpretation in favor of meritorious creditors. The tendency of their decisions is to bring all mistakes which have defeated actions independently of their merits within the saving statute." Thus a mistake in the residence of defendant is held to be an unavoidable accident within that clause, citing 12, Met. 15.

In this case the Court says: That it makes no difference whether the want of jurisdiction appears as a matter of law from the writ or one of fact, as the statute is sufficiently broad in either case.

ARGUMENT.

The Acts of Tennessee, 1815 & 1819, which are shown by the foregoing authorities to have been embraced in section 2755 of Code; authorized new suits to be commenced to save the bar of the statute only in three classes of cases. First, where

judgment for plaintiff was reversed; second, where judgment was arrested; and third, where defendant could not be served with process. Now it will be seen that even prior to the extension of this rule by said Section of the Code, a plaintiff who had commenced suit by issuance of a summons (for under Section 2754 of the Code, the issuance of a summons is the commencement of a suit) could, without proceeding further, dismiss the same and commence a new suit, within a year (see 3d rule, above referred to, under act of 1819), even though the Court had no jurisdiction of the former suit, for until the declaration was filed, it would be unable to determine if such jurisdiction existed; while under the Act he could dismiss and commence again, before the evidence of jurisdiction existed.

So if the defendant's construction of the Section 2755 (which includes the provision of the act of 1819 and goes far beyond it, in enlarging the rule) were true, then the law of Tennessee would be as follows, to-wit: A plaintiff might commence a suit in a Court which had no jurisdiction, issue the summons and allow the case to remain on the docket without taking further steps, and years after dismiss his suit, or allow judgment against himself for failure to prosecute, and within a year to commence a new suit; while if he had gone further in the progress of said suit, filed his declaration and perfected his pleadings, and developed a want of jurisdiction (which was the fact in the former hypothesis, though not developed), he would be deprived of the benefit of said section.

Under Code of Tennessee, Section 2754, a suit is commenced from the issuing of the summons, which must be done as much as five days prior to the beginning of the term of Court. While Section 4238 requires the declaration to be filed within the first three days after the term commences. Now the plaintiff under the opposing counsel's construction of this section, could dismiss or allow judgment against himself, at any time from the date of issuing of summons prior to the filing of the declaration, and then commence a new

suit within a year thereafter; but could not get the benefit of such section, if the judgment or dismissal was delayed until the filing of the declaration, because it might show a want of jurisdiction.

The summons under the law of Tennessee is merely a notice issued by the Clerk of the Court, notifying the defendant by name, to appear in Court and answer the plaintiff; the citizenship of neither plaintiff or defendant being stated, nor any other test of jurisdiction being shown. The declaration being the first paper filed in the litigation, showing the citizenship, or the facts upon which the action is predicated.

So the construction, contended for by defendant, if true, enables a plaintiff to dismiss his suit, or allow judgment against him, after the summons is issued and prior to the filing of any pleadings, or proof, tending to show whether there is any jurisdiction either as to parties or subject matter, for the reason that if the summons is issued the action is one commenced and pending as contemplated by Section 2755 of the Code; while if the pleadings are fully made up, and trial of the cause actually had, and should result in a discovery of facts showing a want of jurisdiction, then it is not an action or suit commenced as contemplated by said section. In other words the issuing of the summons is a commencement, even if jurisdiction does not exist; yet if trial is had and suit continued until final ending, it is not the commencement of a suit. The question of jurisdiction is often one of fact, and can be ascertained only upon a development of the proof as produced upon the trial; and as the law existed in Tennessee at the date of that section of the code, and even now, it is frequently a very difficult question to determine, whether the Chancery or Law Courts have jurisdiction of many causes; and to hold that the Legislature intended to deprive a litigant of the benefit of this section, when he made a mistake as to the tribunal in which he first commenced his action, would, in our opinion, be excluding

from the operation of the section one of the very classes of cases for which this section was intended to provide.

The theory or object of the Statute of Limitation, is to bar the remedy of the creditor who is guilty of laches, and to encourage the vigilant by creating an absolute bar as to actions not commenced within a named time, on the presumption in favor of defendant that the claim has been paid or satisfied. While in the case at bar plaintiff has been guilty of no laches, but diligent in the prosecution of his action, and by the prosecution of his suit, rebuts all presumptions of satisfaction or payment.

We submit that not only is the language of this section of the Code sufficiently broad to cover the case at bar, but that the intention of the Legislature in passing the Act was to provide for just this class of cases.

The fact that it is very difficult often to ascertain, since the extension of the jurisdiction of our Chancery Courts by the various statutes, what Court had jurisdiction of a large class of causes, induced the General Assembly to enact this statute, to protect litigants who might make a mistake in the selection of their tribunal, and to cover such cases and all others when the plaintiff's rights had not been determined; it incorporated in said Act the broadest language, allowing the plaintiff to commence his new action within the year, where a judgment had been rendered "upon any ground not concluding his right of action,"

II.

The Circuit Court had jurisdiction of the original suit, upon which the present suit is based.

As before stated the object of both suits was to recover the possession of land purchased by plaintiff at the United States sale for Collection of Taxes within the Insurrectionary Districts under Act of Congress 1862, and Acts amendatory thereof. The tax contemplated by this Act of Congress was a *revenue* tax in contradistinction to *internal* revenue. It was a tax levied directly upon land and the provisions for its col-

lection are very different from those provided for the collection of the internal revenue; the officers for collection are different, and the tax is named in the Act as a revenue tax while the taxes named in the internal revenue laws are termed internal revenue taxes. Internal revenue is a tax wholly for the Government; while this direct tax is only partly for the Government, as the Act provides that one-fourth of the amount collected is to be paid to the State in which the tax is collected. This tax, as shown by the Acts, was to be levied or proportioned according to population, and falls within the Constitutional description of a direct tax.

The Act of 1833 gave jurisdiction to United States Courts as to all cases in law or equity arising under the revenue laws.—Section 2, Act 1833. It is not denied that this Act gives the jurisdiction. This Act of 1833 as to jurisdiction of United States Court was extended by Act of 1864, Section 50, so as to include internal revenue; and the Act 1866, Statute 13, p 218–223, repealed the Act of 1864, granting the extension, the effect of which, as we contend, was to take from said Courts the jurisdiction as to internal revenue cases, which was conferred by the Act of 1864, and leave the jurisdiction as to revenue cases as it formerly existed under the Act of 1833.

Our position then is that the tax in this case for the nonpayment of which the defendant's property was sold, was a revenue tax as contradistinguished from an internal revenue tax.

In the case of Peyton vs. Bliss, 1 Woolworth, p 173, Justice Miller expressly decided that a tax of this class was a revenue tax and not internal revenue, and therefore not affected by the repealing Act of 1866. That a direct tax such as this was a revenue tax.

The case of Springer vs. United States, 102, U. S. p 586, conforms to the opinion of Justice Miller in the above case, and holds that these direct taxes or cases falling under the same class as the one now before this Court, was a direct or revenue tax as contradistinguished from an indirect or inter-

nal revenue and within the jurisd'ction of the United States Courts.

The cases of Richie vs. Insurance Company, and Philadelphia vs. Collector, 5, Wall, relied on by the defense, are not in conflict with the above, as those cases applied to internal revenue and not to the direct tax, under which plaintiff claims title, and under which he commenced his first suit.

There is nothing to show that the first suit was dismissed for any inherent want of jurisdiction in the Court in which it was brought. The declaration in that case was fatally defective in its statement of the jurisdictional fact, (*ex. parte*, Smith 94th U. S. 455.)

It being settled by the cases of Peyton vs. Bliss and Springer vs. U. S. supra, that the Court did have jurisdiction of a case properly arising, under the U. S. direct Tax laws; and it being further settled in the case of *ex. parte* Smith, that the defect in the first suit was in the declaration merely, and not in any inherent want of jurisdiction of a case properly stated, it must be presumed, (if any presumption will be indulged), that the dismissal of the first suit was, upon the correct ground, that the declaration was defective. From all of which it appears that the first suit was commenced in a Court having jurisdiction, and was dismissed solely for a defective statement of the jurisdictional facts on part of plaintiff.

D. E. MYERS,
W. M. SNEED,
S. P. WALKER,

ATTORNEYS.

Shellabarger & Wilson

109-426

OFFICE SUPREME COURT U. S.
FILED
NOV 23 1893

IN THE

SUPREME COURT OF THE UNITED STATES.

SMITH & HURST
vs.
McNEAL ET AL
} No. 127.

DEFENDANTS BRIEF.

P. PHILLIPS,
W. HALLETT PHILLIPS,
For Def'ts.

R. O. POLKINHORN, PRINTER.

IN THE

SUPREME COURT OF THE UNITED STATES.

SMITH & HURST
vs.
McNEAL ET AL. } No. 127.

Brief of P. Phillips and W. Hallett Phillips for Defendants in Error.

The plaintiffs in error brought suit against defendants on 31 December, 1873, in the Circuit Court United States for the western district of Tennessee, to recover forty acres of land held by them under a certificate of the United States District Commissioners, under the act of Congress. The declaration further alleges that the defendant, on the 1 December, 1865, entered thereupon and unlawfully withholds and detains the same, together with $5000 due for detention thereof.

To this declaration the plea of not guilty was filed, and upon agreement of counsel it was withdrawn, and a motion to dismiss for want of jurisdiction was substituted on 2d June, 1874. (p. 12.)

On the 1 July, 1876, two of the defendants, McNeal and Caruthers, demur to the declaration—first, for insufficient description of the property claimed, and second, because the

declaration does not show that the plaintiff is not a citizen of this State so as to give the courts jurisdiction of the cause.

On 24 February, 1877, judgment was entered dismissing the suit "upon the ground that the court has no jurisdiction of the cause of action in plaintiffs' declaration alleged and set forth." (p. 15.)

On 22 March, 1877, a bill of exceptions was filed, in which it is recited that the plaintiff, to maintain the jurisdiction, "*relied upon the act of Congress of 1833, 4 Stat., 632, and the judiciary act of 1874, as well as other acts of Congress* relative to said subject, and after fully considering the same the court was of opinion that this court had no jurisdiction to try the cause on its merits, and thereupon sustained the defendants' demurrer, so far as the question of jurisdiction was therein raised." (p. 16.)

This suit having thus ended, the same plaintiffs, on 20 October, 1877, brought suit against same defendants in same court.

The declaration in this case is the same as in the first case, with this additional averment:

> "Defendants do not claim under, but adversely to, and deny the validity of plaintiffs' claim of title under the aforesaid acts of Congress; and the validity of the plaintiffs' claim of title under the aforesaid acts of Congress is the only question in controversy between plaintiffs and defendants." p. 1.

On 2 January, 1879, defendants filed two pleas:

The first on the ground of the Statute of Limitations of seven years.

The second was the plea of not guilty.

On the 4th January, 1879, the plaintiffs, as to the plea of the statute, makes this reply:

> "That on 31 December, 1873, and within seven years from the time the cause of action accrued, the plaintiffs brought suit against defendants in this court to

recover possession of the same premises whereof plaintiffs here now seek to recover possession; and the said suit was commenced upon the same cause of action that the plaintiffs new writ and action are founded. That the said action so commenced as aforesaid was duly prosecuted by plaintiffs until the 1st September, 1877, upon which day a judgment (which said judgment remaining of record is referred to) was therein rendered by said circuit court upon a ground not concluding their said right of action."

On 28 March, 1877, this replication was demurred to on the ground—

"That it appears from the record of the former suit on which plaintiffs rely to save their right of action, under the statutes of Tennessee, was brought in a court which had no jurisdiction thereof, was determined by the judgment of this court therein, which judgment stands in full force, and was dismissed for want of jurisdiction; whereupon defendants say that it appears from the exemplification of the record of said former suit, * * * that the same was not a suit, and does not avail to save to the plaintiffs their right of action herein."

The following is the judgment entry:

"This cause came on this day to be heard on the demurrer of defendants to the replication of plaintiffs to the plea of defendants setting up the Statute of Limitations, and the Court having carefully considered said demurrer is of opinion that the same should be sustained, and it is therefore considered by the Court that the said demurrer be, and the same is hereby sustained, and the plaintiffs' suit is dismissed at the cost of the plaintiffs." p. 6.

To reverse this judgment is the object of the present writ of error.

The replication to the Statute of Limitations is to be tested by the provisions of the State code.

Article 2764 provides "that any person and those claim-

ing under him neglecting for seven years to avail themselves of the benefit of any title, legal or equitable, by action at law, effectually prosecuted against the person in possession, are forever barred."

Article 2765: "No person or any one claiming under him shall have any action either at law or in equity for any lands, &c., but within seven years after the right of action has accrued."

Under the head of "General Provisions" is the following:

Article 2755: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff *upon any ground not concluding his right of action*, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested or reversed on appeal, the plaintiff or his representatives or privies, as the case may be, may commence a new action within *one year after the reversal or arrest*."

Now, as to the first suit dismissed for want of jurisdiction:

On the face of the declaration the want of jurisdiction is apparent, as the requisite citizenship was not averred.

By an afterthought the plaintiff claimed jurisdiction under the act of 1833 and other acts of Congress.

The Court held them insufficient for the purpose.

Whether this judgment was erroneous or not cannot now be inquired into.

The judgment was in an action for land, in which the fictitious proceedings in ejectment are abolished, and is as conclusive as judgments in ordinary actions.

Miles v. *Caldwell*, 2 Wall., 35.

The plaintiff had the right to revise the judgment by writ of error, and has abandoned it.

> "It is a rule, to which no exception is recollected, that the judgment of a court of competent jurisdiction while unreversed, concludes the subject-matter between the same parties. They cannot again bring it into litigation."
>
> "The court has the right to decide every question which occurs in a cause, and, whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court."
>
> *U. S.* v. *Nourse*, 9 Pet., 28;
>
> *Elliot* v. *Pearsall*, 1 Pet., 340.

A decision on the question of jurisdiction is as conclusive as a decision on any other question arising in the cause.

> *Grignon* v. *Astor*, 2 How., 319;
>
> *Penhallow* v. *Doane*, 3 Dal., 54.

Having thus disposed of the first case, we are to deal with the present action.

When the second suit was brought the seven years had expired, and under the provisions of Art. 2,764, the plaintiffs were "forever barred," for they had not, "by an action at law, *effectually prosecuted* his claim against the parties in possession."

In this suit, as heretofore stated, the plaintiffs in their declaration, for the purpose of giving jurisdiction, averred that the "defendants do not claim under, but adversely to, and deny the plaintiffs' claim of title under the aforesaid acts of Congress, and the validity of plaintiffs' title under the aforesaid acts of Congress, is the only question in controversy between plaintiffs and defendants."

We submit that this averment of defendants' position cannot confer jurisdiction. The pleas of defendants were not guilty, and the Stat. of Limitations.

> *Ex Parte* Smith, 94 U. S., 455;

Romie v. *Casanova*, 91 U. S., 380;
McStea v. *Friedman*, 92 U. S., 723.

As the question of jurisdiction was not raised in this case we pass to the consideration of the plaintiffs' right to a second suit under Art. 2,755.

By the express terms of this article, a new action is only allowed in cases where a "*judgment or decree is rendered in favor of the plaintiff, and is arrested or reversed on appeal.*"

It is not pretended that the plaintiffs' case, is covered by these two exceptions.

We have, however, to admit that by the State decisions, the right to a second trial has not been confined to arrest of judgment or reversal.

In *Cole* vs. *Mayor*, 5 Cold., where the judgment against plaintiff was for want of papers, and a new trial was sustained, the court say:

> "There is nothing in the record by which it appears that he was *guilty of any wrong or negligence.* The judgment is not in the nature of a *non suit*, and was dismissed upon a ground not concluding his right of action."

Assuming that this Court will be governed by the decision of the State Court in construing a State Statute—the question is still open—as to what cases are included within the terms "not concluding his right of action."

Our proposition is, that the bringing of the suit in a court having no jurisdiction thereof was gross negligence, and that the current of authorities is against extending the terms of the Statute to let in a second trial to one guilty of it.

It is to be noted that in the case just cited, the Court guard itself in the statement that the party was not guilty *of any wrong or negligence.*

So in *Givens* vs. *Robbins*, cited by defendant in error, the Court sustaining the second suit say, "the party having sued in time, was prevented from collecting his debt by an error of the Court or by a mistake which did not *impute neglect or laches to him.*" 11 Ala., 159.

Montgomery vs. *Caldwell*, it is held—

> "Whatever disposition might exist with the court to extend the operation of the proviso, they are unable to perceive any principle which can authorize the case in question to be brought within it; for, as the appellee voluntarily abandoned his first suit, he ought not to be permitted to avail himself of his own laches as a means whereby the plain operations of a statute made for the repose of defendants should be defeated of its purpose."
> 4 Bibb, 306.

In *Crane* vs. *French*, it is said to be well settled in Mississippi, that no equitable exceptions will be engrafted on the statute. Hence, a suit brought within one year after the *abatement* of the former suit by the death of defendant, is not within the provision allowing a new suit within one year after the arrest or reversal of the judgment rendered in favor of plaintiff."
38 Miss., 502.

In *Cumming* vs. *Jacobs*, the statute provided for a new action where the first was defeated "for any matter of form."

The first action was defeated by an entry of "neither party."

The Court held that there was ample opportunity, on motion, to have the case restored, for the plaintiff to show that the absence was not due to her neglect or the fault of her attorney; and the overruling of the motion implies that there was such neglect as to warrant the Court in refusing to grant the motion. A party who has lost his standing in court by a non-suit or default entered for his

failure to appear and prosecute, or defend the action, cannot bo said to have been defeated in his cause by *any matter of form* within the meaning of the statute.

130 Mass., 419.

Other cases to same effect may be cited, and we think it necessary to add only what this Court has said on the subject:

> "When cases present themselves in which no *laches* can be imputed to the plaintiff, but great injustice would be done by applying to such cases the effect of the statute, the conclusion of reason and law is that such cases were not in the mind of the Legislature—such are the cases of a want of parties, plaintiffs, or defendants, whereby a temporary suspension of legal remedy takes place. But in no case of a voluntary abandonment of an action has an exception to the statute of limitations been supported." 8 Cr., 93.

It is denied that the proceeding in the first case is a suit which avails to save the right to a second action.

A suit is the *lawful demand* of one's right.

3 Black Com., Marg'l p. 116.

The term suit, is a comprehensive one, and is understood to apply to any proceeding in a Court of Justice in which an individual pursues that remedy which the *law affords him.*

Western vs. *Charleston*, 2 Pet., 449.

A proceeding in a court having no authority to hear and determine it, is a void act, and produces no effect: *nihili nullae sunt proprietates, quod nullum est nullum producit effectum.*

In *Gray* vs. *Hodge*, it is held:

> "Whether that section of the code permitting plaintiffs who have sued before the statutory bar has attached, and whose suit has been dismissed, to sue again

within six months from the dismissal, qualifies the act of 1869, or not, the action is barred.

"The plaintiff shows by his own action, to wit, by the judgment of dismissal, that he did not bring any suit before January, 1870, in a court having jurisdiction.

"A suit in a court having no jurisdiction is no suit at all. It is simply a nullity, and the judgment not excepted to is conclusive that the court had no jurisdiction." 50 Geo., 262.

In *Donnell* vs. *Gatchell*, the statute provided for a second suit—after abatement on defect of a former suit—the court said:

"The statute only allows another action when a suit has been abated, or an action defeated for any matter of form.

"The writ, in the former action, was not abated for any matter of form, but because it appeared, upon inspection, to have been commenced in the county of Lincoln, when it should have been in the county of Cumberland."

38 Maine, 217.

The general rule is, if the plaintiff mistakes his remedy, in the absence of any statutory provision saving his right, and during the pendency of the action, the statute runs upon his claim the remedy is barred.

Wood on Limitations, § 293.

The precise question has been made in some States the subject of statutory regulations.

Thus the code of Louisiana provides that a suit interrupts the statute of limitations, though brought in a court having no jurisdiction.

On the other hand, Art. 2,247 of the code Napoleon declares the interruption of prescription is considered as *non avenue* if the suit be informal or if the demand be rejected.

Barrow vs. *Shields*, 13 An., 58.